Supreme Court, U.S.
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Nos. 02-1574 and 02-1624

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,

v.

MICHAEL A. NEWDOW, ET AL.

ELK GROVE UNIFIED SCHOOL DISTRICT, ET AL., *Petitioners*,

v.

MICHAEL A. NEWDOW

On Petitions for Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN OPPOSITION TO CERTIORARI OR, ALTERNATIVELY, IN SUPPORT OF VACATUR

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QUESTIONS PRESENTED

1. Whether the United States is a "losing party" entitled to invoke the Court's jurisdiction under Section 1254(1).

2. Whether, if the United States is entitled to invoke the Court's jurisdiction, the Court has jurisdiction to adjudicate the merits of respondent's claim against the United States in view of sovereign immunity.

3. Whether the Court should decide the issue of California law on which respondent's Article III standing depends.

4. Whether the Establishment Clause permits teacher-led recitation of the Pledge of Allegiance in public elementary and secondary schools.

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INTEREST OF AMICUS [1]

Americans United for Separation of Church and State is a 75,000-member not-for-profit organization dedicated to defending religious diversity and church-state separation. It advances these goals by speaking out through the media, public forums, and other channels; mobilizing Americans at the grassroots level and through state and regional chapters; advocating for separation of church and state in Congress and state legislatures; and participating in litigation. Americans United was the respondent in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982). In the past thirty years it has filed or joined amicus briefs in numerous Establishment Clause cases. *E.g.*, *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000); *Edwards* v. *Aguillard*, 482 U.S. 578 (1987); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

SUMMARY

1. The United States may not invoke the Court's jurisdiction under 28 U.S.C. 1254(1). The district court dismissed Newdow's complaint in its entirety. The Ninth Circuit vacated that dismissal only with respect to Newdow's claim against EGUSD's Pledge policy. Section 1254(1) does not authorize and Article III does not permit the United States to seek review of a lower court's ruling against another party, even though the United States may regret the ruling. Its petition must therefore be denied for want of jurisdiction.

2. Even if the Ninth Circuit were deemed to have upheld a claim against the United States, the Court would lack

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

jurisdiction to review its judgment with respect to that claim on the merits, because such a claim is barred by sovereign immunity. At most, the United States would be entitled to vacatur of the judgment against it for want of jurisdiction.

3. Newdow's Article III standing to challenge the school district's Pledge policy turns on a novel and unsettled question of California law that the Court should not decide without clear guidance from the California Supreme Court. This Court normally does not second-guess a court of appeals' determination of state law. Doing so here would be particularly inadvisable because it would require the Court to decide a disputed state-law question with far-reaching implications for non-custodial parents under California law. Deciding that question against Newdow, moreover, could present the Court with further constitutional issues to resolve. The Court should not expend its energies to such ends simply to reach the merits. Instead, it should deny the petitions and await a case without such complications. At most, the Court should grant the petition in No. 02-1624, vacate the Ninth Circuit's judgment, and remand with a direction to certify to the California Supreme Court the state-law question on which Newdow's Article III standing depends. The state court's answer to that question could obviate any need to decide the federal constitutional claim.

4. Review of the Ninth Circuit's holding that the school district's Pledge policy violates the Establishment Clause is unwarranted. The court of appeals faithfully applied this Court's precedents "protecting freedom of conscience from subtle coercive pressures in the elementary and secondary public schools." *Lee* v. *Weisman*, 505 U.S. 577, 592 (1992). The court correctly recognized that teacher-led classroom recitation of the Pledge is no mere commemoration of historical or cultural fact but a "ceremony of assent." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 634 (1943). The court also correctly recognized that pledging allegiance

to a nation "under God" implies a belief in the existence of "God" and a commitment to a polity defined by religious devotion and subordination to divine authority. And the court correctly determined that, to this extent, teacher-led classroom recitation of the Pledge is a religious exercise—not because it contains religious references, but because it is a *pledge*—and as such must be forbidden in public elementary and secondary schools because of its inescapably and uniquely coercive effect.

ARGUMENT

I. THE UNITED STATES IS NOT A "LOSING PARTY" ENTITLED TO INVOKE THE COURT'S JURISDICTION.

Section 1254(1) provides for review of a civil or criminal case in a court of appeals upon the petition of "any party" to the case. As the Court has explained, however, its certiorari jurisdiction can be invoked only by a party who has lost below. Section 1254(1) does not authorize and Article III does not permit review at the behest of a prevailing party. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam); *Maine* v. *Taylor*, 477 U.S. 131, 136 (1986); see generally *Hohn* v. *United States*, 524 U.S. 236, 241 (1998); *Lewis* v. *Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990).

EGUSD lost below; the United States prevailed. The district court dismissed Newdow's complaint in its entirety, including (i) his claims against EGUSD and SCUSD with respect to their Pledge policies, and (ii) his claim against the United States and the other federal defendants with respect to the federal Pledge statute. The Ninth Circuit vacated the district court's dismissal of the complaint only "with respect to Newdow's claim that the school district's Pledge policy violates the Establishment Clause." App. 18a. The court "decline[d] to reach" the constitutionality of the federal Pledge statute, *id.*, invalidating EGUSD's policy not be-

cause it found the Pledge inherently unconstitutional, but because it found teacher-led classroom recitation of the Pledge impermissibly coercive, *id.* at 11a-16a. Newdow's claim against it having been dismissed, and the Ninth Circuit having left that aspect of the district court's ruling undisturbed, the United States is now out of the case. Its petition must therefore be denied for want of jurisdiction.

The Solicitor General asserts that the Ninth Circuit "vacated the district court's decision in favor of the United States" with respect to Newdow's challenge to the facial constitutionality of the Pledge. US Pet. 11. That is incorrect. As the Ninth Circuit noted, the district court did not decide that question. App. 18a. Indeed, the United States argued below that Article III barred adjudication of that question because it was the school district's policy, not the federal statute, that was the source of Newdow's claimed injury. *E.g.*, Pet. of US for Reh'g and Reh'g en Banc 2, 15-17. The United States argued that the *only* claim Newdow had standing to assert, if any, was his "interference" claim, which the United States argued was "properly directed at [the] state defendants," not the United States. *Id.* at 17.

The Solicitor General also asserts that the federal statute has been invalidated "as applied." US Pet. 25. That is also incorrect. It is not the federal statute that has been applied but the California law requiring "patriotic exercises" to be conducted at the beginning of each school day, which can be satisfied by reciting the Pledge. See App. 2a-3a. As the United States noted below, the federal statute "simply sets out the words of the 'official' pledge. It does not dictate or require any action by plaintiff's daughter or her school." Mot. to Address Juris. Issues 3; see also App. 53a n.1 (Fernandez, J., concurring and dissenting) ("Congress has not compelled anyone to do anything.").

Finally, the Solicitor General asserts that the Ninth Circuit's ruling "calls into question" practices in schools for

military dependants. US Pet. 2 n.2. But Newdow did not challenge those practices, Article III would not have allowed him to challenge them, see App. 7a-8a (dismissing claim against SCUSD for lack of standing), and the Ninth Circuit did not rule on them. Article III does not allow the United States to seek review of the Ninth Circuit's ruling based on its possible implications for those practices. See *Rooney*, 483 U.S. at 311 (lower court's use of analysis that may be adverse to prevailing party's "long-term interests does not allow the [party] to claim status as a losing party for purposes of this Court's review").

II. THE COURT LACKS JURISDICTION TO DECIDE THE MERITS OF NEWDOW'S CLAIM AGAINST THE UNITED STATES.

In any event, the United States would not be entitled to merits review of any judgment against it. Sovereign immunity barred Newdow's claim against the United States. The courts below therefore lacked jurisdiction to decide that claim, and this Court does as well.[2] At most, the United States would be entitled to vacatur of the judgment against it with respect to that claim for want of jurisdiction.

1. "Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity." *United States* v. *White Mountain Apache Tribe*, 123 S. Ct. 1126, 1132 (2003). "Absent that consent, the attempted exercise of judicial power is void." *United States* v. *U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940). Here, as the Solicitor General observes, "[n]o federal statute waives the sovereign immunity of the United

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[2] The Court must "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a case under review, even though the parties are prepared to concede it." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 73 (1997) (internal quotation marks omitted).

States of America from a suit for declaratory or injunctive relief under the First Amendment," US Pet. 2, and the Solicitor General does not contend that the United States waived sovereign immunity by participating below.[3] Accordingly, the courts below lacked jurisdiction over Newdow's claim against the United States, precluding merits review. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 95 (1998).

2. The Solicitor General asserts that sovereign immunity is "without jurisdictional consequence" because, under 28 U.S.C. 2403(a), the United States "could have" intervened in connection with Newdow's action against the other defendants to defend the constitutionality of the federal Pledge statute; and the Solicitor General urges that the United States "should hereby be deemed to have" done so. US Pet. 2. But the Solicitor General offers no justification for grounding this Court's jurisdiction in action that a person "could have" taken below. Cf. *Steel Co.*, 523 U.S. at 94-101 (rejecting "hypothetical jurisdiction"). Such a counterfactual, hypothetical basis for jurisdiction is insufficient.[4]

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[3] Officers of the United States cannot waive sovereign immunity by participating in a case; only Congress can waive sovereign immunity. See, *e.g.*, *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947); *Minnesota* v. *United States*, 305 U.S. 382, 388-89 (1939).

[4] See *Philbrook* v. *Glodgett*, 421 U.S. 707, 720-22 (1975). In *Philbrook* the Court dismissed an appeal by the Secretary of HEW from a decision of a three-judge district court because the Secretary failed to establish that the district court actually had jurisdiction to entertain the plaintiff's claim against him. The Secretary argued that it was unnecessary for him to establish that the district court had jurisdiction because he intended to intervene on remand if the Court ruled in his favor and to abide by the Court's decision if it did not. The Secretary's reliance on what he could do on remand to perfect jurisdiction was unavailing in *Philbrook*; the Solicitor General's reliance on what the United States "could have" done earlier to perfect jurisdiction is unavailing here.

As the Solicitor General implicitly recognizes, the United States cannot intervene under Section 2403(a) now. Section 2403(a) applies only when "the constitutionality of [an] Act of Congress . . . is drawn in question," and the Ninth Circuit "decline[d] to reach" the constitutionality of the federal statute, App. 18a; *supra* pp. 3-4; see also *Nat'l Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) ("we do not decide in the first instance issues not decided below").

III. NEWDOW'S STANDING TURNS ON A NOVEL AND UNSETTLED ISSUE OF STATE LAW.

The Ninth Circuit's holding that Newdow has Article III standing is entirely dependent on its resolution of a novel and unsettled issue of California law with far-reaching implications for the rights of non-custodial parents. The Ninth Circuit's resolution of this issue does not warrant review, and it would be inadvisable for the Court to review the issue without clear guidance from the California Supreme Court and briefing by interested parties.

1. In its Oct. 9, 2002, Order, the Ninth Circuit directed briefing on the following two questions:

> Whether under CA state law the award of sole legal custody to one parent deprives the other of standing to object on constitutional grounds to the contents of school curricula, observances, and ceremonies affecting the child's education and religious upbringing. If the answer is yes, is the California rule constitutional?

After briefing, the Ninth Circuit found that California law recognizes a non-custodial parent's right to object on constitutional grounds to school policies that undermine his efforts to influence his child's religious upbringing, regardless of whether the custodial parent consents to those policies. App. 95a-98a (discussing California cases). The court's holding that Newdow had Article III standing rests entirely on its conclusion that California law recognizes such a right.

The Court normally accepts a court of appeals' determination of state law and does not grant certiorari to review such determinations. The Court should be especially reluctant to grant review where, as here, resolving an Article III standing issue would require the Court to decide a novel and unsettled question of state law having far-reaching implications for the rights of non-custodial parents under California law. See EGUSD Pet. 20 ("[n]o California court has addressed" the issue); EGUSD Supp'l Br. Regarding Standing and Const'l Issues 1-2 ("This is a matter of first impression . . . ."); Supp'l Br. of US on Pet. for Reh'g en Banc 1-8 (Newdow's standing turns on question of California law).

The Court should decline to address this important state-law issue without clear guidance from the California Supreme Court and thorough briefing by parties and amici with a broader interest in issues of family law. Were this Court to decide the state-law issue against Newdow, moreover, it might then need to decide whether the resulting state-law rule *denying* Newdow the right to challenge the school district's policy is constitutional. See Ninth Circuit Order, Oct. 9, 2002. The Court should decline petitioners' invitation to decide the state-law issue as well as their invitation to use this case to limit, as a matter of *federal* law, the rights states may allow non-custodial parents to assert once they have lost custody. See US Pet. 26-27; EGUSD Pet. 20-21; cf. *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938).

At most, the Court should grant the petition in No. 02-1624, vacate the judgment of the Ninth Circuit, and remand the case with a direction that the Ninth Circuit certify to the California Supreme Court the state-law question on which Newdow's Article III standing depends, or grant the petition and certify the question directly. See Cal. Ct. R. 29.8(a); see also *Arizonans for Official English*, 520 U.S. at 77 (certification appropriate where case presents novel or unsettled questions of state law); *Bellotti* v. *Baird*, 428 U.S. 132, 150-

52 (1976) (GVR directing certification to state court); *Clay* v. *Sun Ins. Office, Ltd.*, 377 U.S. 179, 180-81 & n.2 (1964) (same); *Fiore* v. *White*, 528 U.S. 23, 29-30 (1999) (certifying question directly); *Virginia* v. *Am. Booksellers Ass'n*, 484 U.S. 383, 395-98 (1988) (same).

Of the two certification options, a GVR with a direction to certify would be the more appropriate disposition here because of the Ninth Circuit's "greater familiarity with the record and [California] law." *Mills* v. *Rogers*, 457 U.S. 291, 306 (1982). Either disposition, however, would avoid the need for the Court to decide a far-reaching question of California law and the further constitutional issues that could be raised by its answer. It is possible, moreover, that the California court's answer to the state-law question would obviate any need to decide the ultimate constitutional issue. See *Clay* v. *Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960) ("[W]e have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law.").[5]

2. Petitioners offer several criticisms of the Ninth Circuit's holding that Newdow has standing to challenge the school district's policy. These criticisms lack merit.

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[5] The Court could also direct the Ninth Circuit to remand for consideration by the district court, or to certify to the California Supreme Court, a second state-law question, presented by Newdow in his *pro se* complaint. Newdow alleged that the school districts' Pledge policy violated not only the First Amendment but also Art. I, § 4 and Art. IX, § 8 of the California Constitution. Compl. ¶¶ 67, 118. The district court should have considered his state constitutional challenge before deciding his federal constitutional challenge. See, *e.g.*, *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 117-18 (1984) (citing *Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Siler* v. *Louisville & Nashville R.R. Co.*, 213 U.S. 175, 192-93 (1909)).

a. The Solicitor General asserts that Newdow lacks standing because he "has not suffered the invasion of any legally protected interest." US Pet. 26; accord EGUSD Pet. 20. This, however, merely expresses disagreement with the Ninth Circuit's conclusion that California law affords Newdow such an interest and that the custody order does not empower the custodial parent to negate that interest. The Solicitor General asserts that Newdow is improperly using federal litigation to circumvent state-law processes or modify his custody agreement. US Pet. 27 (citing *Rooker-Feldman* doctrine). This likewise is but an indirect way of saying that the Ninth Circuit's interpretation of Newdow's rights under California law was incorrect. Finally, the Solicitor General asserts that Newdow's right to expose his daughter to his religious views is narrower than the Ninth Circuit supposed. *Id.* at 28. Again, this simply disputes the Ninth Circuit's understanding of the implications of pertinent California law. If the Ninth Circuit's interpretation of California law is correct, Newdow has Article III standing.[6]

b. The Solicitor General also asserts that the Ninth Circuit confused Newdow's standing with the merits of his claim. See US Pet. 28-29. The Solicitor General is mistaken. The injury Newdow has identified is the school district's interference with his efforts to influence his daughter's religious upbringing. The merits issue he seeks to have adjudicated is the constitutionality of that interference. The Ninth Circuit held that under California law Newdow's status as a non-custodial parent does not deprive him of the ability to object to such interference on constitutional grounds.

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[6] The Solicitor General disputes that Newdow's rights under the custody order have been infringed. US Pet. 26-27. This is a straw man. The Ninth Circuit's standing holding rested on its conclusion that under California law Newdow retained rights as a non-custodial parent that the custody order did not displace. App. 96a-98a.

c. Finally, the Solicitor General asserts that invalidating the school district's Pledge policy will not redress Newdow's claimed injury. *Id.* at 29-30. That is also incorrect. Newdow's injury stems not from his daughter's exposure to the Pledge but from her being coerced to participate in reciting the Pledge in a public school ritual. *E.g.*, Compl. ¶¶ 99-101; App. 96a-98a. Invalidation of the school district's Pledge policy obviously redresses that injury.

IV. THE LOWER COURT'S MERITS HOLDING IS LIMITED AND WELL SUPPORTED.

The Ninth Circuit's original decision in this case invalidated not only the school district's Pledge policy, but also the federal Pledge statute. In its amended decision, the Ninth Circuit—urged by the United States that Article III barred adjudication of the constitutionality of the federal statute—declined to decide the constitutionality of the statute. The court limited its holding to daily teacher-led recitation of the Pledge in public elementary schools and rested its holding on the special problems of indirect coercion presented in that setting. The court's decision is a faithful application of this Court's precedents and does not warrant review.[7]

1. The Court has long recognized that children are subject to a "pronounced" and "particular risk" of coercion in school settings. *Lee*, 505 U.S. at 592; see also, *e.g.*, *Santa Fe*, 530 U.S. at 315-17; *Aguillard*, 482 U.S. at 583-84; *Wallace* v. *Jaffree*, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring in judgment); *School Dist.* v. *Schempp*, 374 U.S. 203, 290 (1963) (Brennan, J., concurring). The Court ac-

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[7] The Ninth Circuit thus did not hold that "the inclusion of the phrase 'under God' in the Pledge of Allegiance . . . violates the Establishment Clause of the First Amendment." US Pet. at I. The first question in the petition in No. 02-1574 is therefore far too broadly stated.

cordingly has "been 'particularly vigilant' in monitoring compliance with the Establishment Clause in [the primary and secondary school] context, where the State exerts 'great authority and coercive power' over students through mandatory attendance requirements." *City of Elkhart* v. *Books*, 121 S. Ct. 2209, 2211 (2001) (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting from denial of certiorari) (quoting *Aguillard*, 482 U.S. at 583-84); see also *Lee*, 505 U.S. at 631 (Souter, J., joined by Stevens & O'Connor, JJ., concurring) ("When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause.").

The Court has further recognized that, even if students are not formally required to participate in a religious exercise in a school setting, their susceptibility to peer pressure and a desire to please adult school officials in a setting where attendance is mandatory produce an "improper" coercive effect, *Santa Fe*, 530 U.S. at 311, placing students in an "untenable position" of choosing between participation and protest, *Lee*, 505 U.S. at 590. For primary and secondary school children, the Court has stated, such a choice is no choice at all. *Lee*, 505 U.S. at 593-94. Contrast *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983) (Establishment Clause concerns diminish when those claiming injury are adults "not readily susceptible to 'religious indoctrination' . . . or peer pressure."); *Tilton* v. *Richardson*, 403 U.S. 672, 686 (1971) (plurality opinion) ("college students are less impressionable and less susceptible to religious indoctrination" than elementary and secondary school-age children).

2. The Ninth Circuit correctly recognized that daily teacher-led recitation of the Pledge in primary school classes presents a forbidden risk of indirect religious coercion.

a. The Pledge is a tool for inculcating primary and secondary school children with the ideals it embodies; that is why

it is prescribed for them. The Pledge accomplishes its inculcative purpose through a "ceremony of assent," *Barnette*, 319 U.S. at 634, a "ritual," *id.*, accompanied by "gestures of acceptance or respect," *id.* at 632. To recite the Pledge is "to declare a belief," *id.* at 631, to affirm "a belief and an attitude of mind," *id.* at 633. In this "prescribed ceremony," *id.* at 633, students stand at attention, facing the flag, right hand on heart, and in unison with each other and adult authorities proclaim their "allegiance to the flag of the United States of America and to the Republic for which it stands." The Pledge defines that "Republic" by specific qualities—unity and indivisibility ("one Nation . . . indivisible"), subordination to divine authority ("under God"), and universal "liberty and justice." The Court recognized in *Barnette* that such qualities are not "descriptive of the present order" or "political history," but are "statement[s] of belief" in an "ideal" vision. *Id.* at 634 & n.14. The purpose of teacher-led classroom recitation of the Pledge is to inculcate children with this ideal vision, through a ritual communicating "by word and sign" their "acceptance of the political ideas [the flag] bespeaks." *Id.* at 633.

b. Since 1954, the Pledge has included, among the ideas whose acceptance it communicates, belief in God, national subordination to God, and national religious devotion. The addition of the phrase "under God" was no mere attempt to "acknowledge" the nation's "religious heritage" and its "culture and character." US Pet. 21. Rather, the phrase was added so that school children would daily "proclaim . . . the dedication of our Nation and our people to the Almighty." App. 14a (quoting signing statement of the President); see also H.R. Rep. No. 83-1693, at 3 (1954) (asserting that "under God" is consistent with First Amendment because it expresses "a belief in the sovereignty of God" rather than affirming "religion as an institution," and because it "recognizes only the guidance of God in our national affairs"); S. Rep. No. 83-1287, at 2 (1954) (same).

In explaining the measure, Rep. Rabaut, the House sponsor, stated: "Unless we are willing to affirm our belief in the existence of God and His creator-creature relations to man, we drop man himself to the significance of a grain of sand . . . ." 100 Cong. Rec. 1700 (1954). Senator Ferguson, the Senate sponsor, stated that he had proposed "under God" because he felt that the Pledge "should recognize the Creator who we really believe is in control of the destinies of this great Republic." *Id.* at 6348. While asserting that "[t]his is not an attempt to establish a religion," he explained:

> It relates to belief in God, in whom we sincerely repose our trust. We know that America cannot be defended by guns, planes, and ships alone. Appropriations and expenditures for defense will be of value only if the God under whom we live believes that we are in the right. We should at all times recognize God's province over the lives of our people and over this great Nation.

Id. Representative Rodino, author of a like measure, urged adoption of the phrase to ensure that "every day that our children go to school and make their pledge of allegiance to the flag they recall that they do so with recognition of God." *H.J. Res. 243 and Other Bills on Pledge of Allegiance: Hearing Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 83d Cong. 37 (1954). "The important thing," he stated, "is that we re-affirm our recognition of the Creator." *Id.* at 27.

Petitioners ignore all such statements, pretending they do not exist. See US Pet. 3-5; EGUSD Pet. 11-14.

At least equally relevant is how the phrase added in 1954 is likely to be perceived by "impressionable" school children, for whom "government endorsement is much more likely to result in coerced religious beliefs." *Jaffree*, 472 U.S. at 81 (O'Connor, J., concurring in judgment); see *Santa*

Fe, 530 U.S. at 307 (touchstone is "how the students understand the policy"); *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 128 (2001) (Breyer, J., concurring) ("[A] child's perception that the school has endorsed a particular religion or religion in general may . . . prove critically important."); *Lynch* v. *Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) ("Examination of both the subjective and the objective components of the message communicated by a government action is . . . necessary to determine whether the action carries a forbidden meaning.").

Children are unlikely to perceive the phrase "under God" as merely descriptive of historical or cultural fact. First, the phrase is one in a series of other phrases that the Court in *Barnette* recognized are *not* "descriptive" of such fact but express ideals in which the Pledge affirms belief. See *supra* pp. 12-13. Children are unlikely to view "under God" as having an import different from the other phrases that surround it. See *Gutierrez* v. *Ada*, 528 U.S. 250, 255 (2000) (applying *noscitur a sociis*); *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (same). It would take a very subtle six-year-old, moreover, to regard the averment that ours is "one Nation under God"—proclaimed as part of a daily classroom ritual, and beginning with the words "I pledge"—as simply "acknowledging" beliefs that *other people* hold and that may or may not be true. Children are bound to perceive the phrase as affirming a belief in the existence of God and national subordination to God, and as expressing commitment to a nation defined by religious devotion. To this extent, teacher-led classroom recitation of the Pledge is a religious exercise—an exercise in religious affirmation—and hence forbidden, even if student participation is not formally required, because of the special risk of indirect coercion.

That the exercise does not take the form of a prayer is irrelevant, for "[t]he government may not compel affirmation

of religious belief." *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990); see also *Good News Club*, 533 U.S. at 126 (Scalia, J., concurring) ("[W]e have previously rejected the attempt to distinguish worship from other religious speech, saying that 'the distinction has [no] intelligible content,' and further, no '*relevance*' to the constitutional issue.") (second alteration in original) (quoting *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981)) (citing *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109 (1943)). The Establishment Clause, moreover, bars government endorsement of religion, not just government-sponsored prayer. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or approval of religion.").

The fact that "under God" is included in a patriotic text does not diminish but compounds the constitutional violation. Far from imbuing the phrase with redeeming "secular purposes," *County of Allegheny* v. *ACLU*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring in part and concurring in judgment), the phrase impermissibly conditions an expression of patriotism on affirmation of religion and religious belief. Cf. *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (state may not require declaration of belief in God as condition of public office). As the Court has emphasized, the Establishment Clause prohibits government from "making adherence to a religion relevant in any way to a person's standing in the political community." *Allegheny*, 492 U.S. at 594 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J. concurring in part and concurring in judgment)). The pressure on a child to affirm religious belief by reciting the Pledge is magnified by the fact that refraining from reciting the Pledge may be construed as lack of patriotism.

Finally, the fact that the phrase "under God" has been part of the Pledge for nearly fifty years does not change the equation: "[N]o one acquires a vested or protected right in

violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Allegheny*, 492 U.S. at 630 (O'Connor, J., joined by Brennan & Stevens, JJ., concurring in part and concurring in judgment) (alteration in original) (quoting *Waltz* v. *Tax Comm'n*, 397 U.S. 664, 678 (1970)).

c. The Ninth Circuit's decision does not imply that school children may not learn, study, or recite historical documents containing religious references. See App. 15a-16a. To the contrary, "the State may require teaching by instruction and study of all in our history and in the structure and organization of our government." *Barnette*, 319 U.S. at 631 (internal quotation marks omitted); see also *Stone* v. *Graham*, 449 U.S. 39, 42 (1980) (per curiam); *Schempp*, 374 U.S. at 225; *Engel* v. *Vitale*, 370 U.S. 421, 435 n.21 (1962). Nor does the Ninth Circuit's decision imply that the Pledge is inherently unconstitutional, or that recitation of the Pledge under official auspices is invariably unconstitutional.

3. The conclusion that teacher-led recitation of the Pledge is forbidden even if participation is not formally required is not inconsistent with *Barnette*. See EGUSD Pet. 9-11. "The First Amendment protects speech and religion by quite different mechanisms." *Lee*, 505 U.S. at 591. No Establishment Clause issue was presented in *Barnette* because the Pledge had not yet been amended to include "under God." The "indirect coercion" principle, recognized by the Court in *Lee*, *Santa Fe*, and other cases, applies where religion is involved because of the Establishment Clause's specific bar against government promotion of religion—a bar that does not apply to government promotion of patriotism. "Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion," *id.* at 604 (Blackmun, J., joined by Stevens & O'Connor, JJ., concurring), and "[t]he Establishment Clause proscribes public schools from conveying or

attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*," *id.* at 604-05 (internal quotation marks omitted).

Nor is the Ninth Circuit's decision foreclosed by statements concerning the Pledge by the Court or individual Justices. See US Pet. 14-20; EGUSD Pet. 7-9. The Court has never held that the Establishment Clause permits teacher-led recitation of the Pledge in public elementary and secondary schools, and the Court's *dicta* do not preclude a holding of its unconstitutionality in the circumstances presented here. Indeed, the dissent in *Lee* recognized that the Court's Establishment Clause analysis in that case foretold the result reached by the Ninth Circuit. 505 U.S. at 638-39 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).

In *Lynch* and *Allegheny* the Court did not confront the issue of teacher-led classroom recitation of the Pledge, with its special issues of indirect coercion; and the principle of *Marsh* likewise has no application in the classroom setting, see *Lee*, 505 U.S. at 596-97. The Court's discussion of the Pledge was not "necessary to the result" in these cases. US Pet. 19. Indeed, in *Allegheny* the Court disclaimed the need to address issues raised by the Pledge, see 492 U.S. at 602-03; and inculcative classroom recitation of the Pledge *fails* the test outlined by Justice O'Connor in her concurring opinion in *Lynch*, see 465 U.S. at 689-94. Such inculcative recitation is not a device for achieving the "secular purposes" identified by Justice O'Connor in her opinion, *Lynch*, 465 U.S. at 693, and cannot be defended on the ground that it conveys no message of religious endorsement and entails no affirmation of religious belief. Compare *Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring in part and concurring in judgment), and *Jaffree*, 472 U.S. at 78 n.5 (O'Connor, J., concurring in judgment) (referring to Pledge in the abstract).

Inculcative teacher-led classroom recitation of the Pledge does both.[8]

4. Finally, although the Ninth Circuit's decision conflicts with the Seventh Circuit's decision in *Sherman* v. *Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992), the conflict does not require the Court's intervention now, and the state-law issues going to Newdow's standing as well as the jurisdictional issues raised by the petition in No. 02-1574 militate against review. The Court has tolerated similar inconsistencies before. In *City of Edmond* v. *Robinson*, 517 U.S. 1201 (1996), the Court declined to resolve a 2-1 circuit split on the question whether a municipality violates the Establishment Clause when its seal includes a religious symbol. And in *Good News Club*, the Court intervened to resolve a circuit conflict that it had earlier declined to resolve in *Bronx Household of Faith* v. *Board of Education*, 523 U.S. 1074 (1998) (order denying certiorari). See *Good News Club*, 533 U.S. at 105-06 (describing circuit split).

Similar forbearance is warranted here. The Seventh Circuit's decision that the school district policy in question

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[8] In *Schempp*, Justice Brennan simply stated that the Pledge "may" not be unconstitutional, 374 U.S. at 304 (concurring), and Justice Goldberg simply stated that the decision did not render unconstitutional, "without more," "all incidents of government which import of the religious," *id.* at 307 (Goldberg, J., joined by Harlan, J., concurring). Justice Brennan reiterated his uncertainty in *Marsh*, 463 U.S. at 783 (Brennan, J., joined by Marshall, J., dissenting), and *Lynch*, 465 U.S. at 716-17 (Brennan, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting), in all three cases suggesting that the Pledge might escape invalidation only if deemed to "have lost through rote repetition any significant religious content," *Lynch*, 465 U.S. at 717; see *Marsh*, 463 U.S. at 818 (Brennan, J., joined by Marshall, J., dissenting); *Schempp*, 374 U.S. at 303-04 (Brennan, J., concurring). Justice Brennan was not considering in these cases inculcative teacher-led classroom recitation of the Pledge.

there did not violate the Establishment Clause rested on its view that the Founders did not regard "ceremonial invocations of God as 'establishment,'" *Sherman*, 980 F.2d at 445, and on its view that this Court's statements about the Pledge in previous opinions precluded a finding of unconstitutionality, *id.* at 446-48. In the decade since *Sherman*, the Seventh Circuit has shown reluctance to accept non-religious rationalizations for religious symbols and references.[9] Meanwhile, this Court has continued to emphasize "the myriad, subtle ways in which Establishment Clause values can be eroded." *Santa Fe*, 530 U.S. at 314 (quoting *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring)). Were the Seventh Circuit to reconsider the issue today, it might well reach a different conclusion. Especially in view of the factors militating against review here, other circuits should be allowed to consider the issue before the Court intervenes.

CONCLUSION

The petitions in Nos. 02-1574 and 02-1624 should be denied. Alternatively, the petition in No. 02-1574 should be denied, and the petition in No. 02-1624 should be granted, the Ninth Circuit's decision vacated, and the case remanded with a direction to certify to the California Supreme Court the question whether California law gives Newdow the right to object on constitutional grounds to the school district's Pledge policy notwithstanding the custodial parent's acquiescence in that policy.

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[9] See *Books* v. *City of Elkhart*, 235 F.3d 292, 306 (7th Cir. 2000) (Ten Commandments display in municipal space unconstitutional; rejecting rationale for display as recognition of "cultural heritage"); *Kerr* v. *Farrey*, 95 F.3d 472, 480 (7th Cir. 1996) (statement "God, as we understood Him" in prison-sponsored substance-abuse program rejected as religious in nature; rejecting rationale that phrase simply expressed "non-religious idea of willpower within the individual").

Respectfully submitted,

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